Supreme Court, U.S.
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No. 88-626

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

THE GOODYEAR TIRE & RUBBER COMPANY,
Petitioner,

v.

DALE L. HODDER,

Respondent.

REPLY MEMORANDUM

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REPLY MEMORANDUM

Respondent challenges the adequacy of petitioner's presentation of its federal questions to the Minnesota courts through a series of factual assertions that are either irrelevant to that issue or are refuted by the record in this case. Respondent also contends that he should prevail on the merits of these questions. Goodyear will address each of these arguments in turn.

1. Presentation of Question 1—The Due Process Clause Challenge to the Imposition of Punitive Damages for Having Failed in the Past to Have Complied with a Subsequently Formulated Legal Standard

Respondent argues at great length, Opp., at 4-13, that Goodyear was aware that he was seeking to establish liability on the theory that Goodyear had failed to meet a continuing duty to warn persons in respondent's position of hazards associated with misuse of KWX rims. Goodyear, however, has never contended that it was unaware of respondent's proposed new legal theory. Indeed, as respondent observes, Opp. at 6, Goodyear filed pretrial motions *in limine* to exclude evidence related to this theory of liability and the trial court denied those motions at that stage of the proceedings.

Its motions *in limine* having been denied, Goodyear understandably introduced evidence at trial of the substantial efforts it had made *voluntarily*—not under legal compulsion and not in recognition of any legal duty—to inform users of the KWX rim regarding the dangers of its misuse. Goodyear, however, never acceded[1] to the proposition that

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[1] Respondent, Opp., at 11-12, asserts that Goodyear "acknowledg[ed]" a post-sale duty to warn by *offering* to stipulate, eighteen months prior to trial and in return for an agreement by respondent to limit discovery, that it had become aware in the mid-1970s of certain consequences associated with the misuse of multi-piece tire rims. The limited purpose of that proffered stipulation was to strike a bargain with respondent regarding evidence and discovery. What respondent fails to point out

Minnesota law imposed a continuing post-sale duty to warn and, as this case went to the jury, the trial court concurred in Goodyear's position. Respondent, for the second time in this Court,[2] fails to acknowledge this crucial fact, which is demonstrated by a colloquy reproduced in App. E to the Petition, 39a-40a, but which merits reiteration here:

> [MR. RISJORD, counsel for respondent Hodder:] You could punish them sure, and you punish for past acts. Punitive damages is based on the past acts, the failure up to the time Dale Hodder got hurt to tell anybody, why didn't—
>
> MR. HENDRICKS [counsel for Goodyear]: Objection, Your Honor. That's improper argument on punitive damages.
>
> [13,956] MR. RISJORD: No. it's a continuing failure to warn.
>
> THE COURT: Sustained.
>
> MR. RISJORD: Well, they are liable for a continuing failure to warn up to the time —
>
> MR. HENDRICKS: Same objection, Your Honor.
>
> MR. RISJORD:—Dale Hodder was injured.
>
> MR. HENDRICKS: Outside the scope of the instructions and improper.
>
> MR. RISJORD: No, it isn't; no it isn't.
>
> THE COURT: Sustained.

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to the Court is that he refused to accept that proposed stipulation, which therefore never existed and has no relevance to this case in the Minnesota courts or this Court.

[2] Respondent presented a virtually identical argument in his Opposition to Goodyear's Application to Continue Stay without mentioning that the trial court had ruled that this case would not be presented to the jury on a continuing-duty-to-warn theory.

The record in this case is therefore quite specific. The trial court precluded, and therefore the jury could not have imposed, punitive damages on Goodyear for violating a continuing, post-sale duty to warn. Respondent did not challenge the trial court's order on this point by filing a cross appeal, known in Minnesota as a "notice of review," as he was required to do under Minn. R. App. P. 106.[3] Thus, this case did not go to the jury or on direct appeal to the Supreme Court of Minnesota on a continuing, post-sale duty to warn theory. Goodyear therefore had no occasion and no obligation, as a matter of state law, to object to an award of punitive damages on the basis of such a theory. It was only when the Supreme Court of Minnesota resurrected that theory[4] and, in doing so, approved that theory for the first time in its jurisprudence, and then imposed a $4,000,000 penalty on Goodyear for not adhering to that duty eight years earlier, that Goodyear had the occasion and obligation to object. And Goodyear did so in the first pleading filed thereafter—its Petition for Rehearing.[5]

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[3] Under Minn. R. App. P. 106, an appellee is required to file a "notice of review" within fifteen days of the filing of the appellant's notice of appeal if it wishes to preserve for appellate review issues decided adversely to it by the trial court.

[4] In its decision, the Supreme Court of Minnesota acknowledged that the instruction given to the jury on duty to warn "seems to be drafted with time-of-sale warnings primarily in mind" but went on to state that that instruction "does not purport to preclude a post-sale duty to warn nor to declare what the law might be on the subject." Pet., App., 12a. Having thus concluded that that instruction did not inform the jury regarding the correct law to apply, that court went on to declare for the first time in its jurisprudence that "a continuing post-sale duty to warn existed" and, remarkably, that this duty "was adequately submitted." *Id.* The most clairvoyant litigant could not be charged with anticipating such a feat of judicial legerdemain.

[5] Respondent, Opp., at 7-8, cites a number of Minnesota and non-Minnesota cases for the proposition that Goodyear, by the time of trial, should have known "the direction the appellate courts would take" with

2. Presentation of Question 2—Goodyear's Due Process Clause Challenge to the Limitless and Standardless Imposition of Punitive Damages

Without any specific focus on Goodyear's presentation to the Minnesota courts of its federal constitutional objections to the imposition of unlimited punitive damage awards under vague, subjective and elastic standards, respondent asserts broadly, Opp., at 13-16, that questions presented for the first time on rehearing will not be heard by the court below and that Goodyear failed to alert the Attorney General of Minnesota to this challenge, Opp., at 17-22. These assertions are meritless for several reasons.

First, as Goodyear documents in its Petition, at 11-12 n.3, it challenged the "free rein" given to this jury, operating under vague and general standards, on due process grounds in the trial court and on direct appeal quoting, *inter alia*, this Court's decision in *Aetna Life Insurance Co.* v. *Lavoie*, 475 U.S. 813, 828-29 (1986). Indeed, in his brief on direct appeal respondent, without suggesting that this argument had not been raised properly in the trial court, joined issue and took the position that *Aetna* was "not even remotely on point." App., *infra*, 2a. *Aetna* is, however, precisely on point, which may explain why respondent's Opposition does not even acknowledge Goodyear's reliance on *Aetna* on direct appeal—a reliance which undermines completely the premise of his argument that this issue was raised for the first time on rehearing.

Second, the punitive damage award at issue in this case is the $4,000,000 award imposed *de novo* by the Supreme

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respect to a potential continuing duty to warn. Given the posture of this case as it went to the jury and on direct appeal, those cases are irrelevant to the question *when* Goodyear should have presented its Due Process Clause challenge to the imposition of punitive damages under a newly recognized standard of conduct. To the extent relevant, those cases are discussed *infra* in connection with the merits of this Due Process Clause issue.

Court of Minnesota after it determined that the jury's award had to be set aside because based upon an incorrect legal theory, *i.e.*, an alleged duty to recall. Goodyear was not required to challenge, nor could it have challenged, the constitutionality of *this* punitive damage award until its petition for rehearing was filed. But in that petition, at its first opportunity, it did so.[6] Respondent's only apparent response to this obvious defect in his argument is the assertion, Opp., at 2, 25, that the court below "remitted" the award to $4,000,000. As Goodyear, however, demonstrates in its Petition, at 10-11, the Supreme Court of Minnesota, in fact, imposed this $4,000,000 punishment *de novo* on a legal theory with respect to which the jury had not been instructed and that had never previously been recognized by that court. This was in no sense a "remittitur," nor did the court below regard it as such (the word "remittitur" does not appear in the opinion of the court below). However labelled, the substance of the action taken by the Supreme Court of Minnesota in imposing this $4,000,000 award stands independently of the jury's award. It is the action of the Supreme Court of Minnesota that is now at issue in this Court.

Third, Goodyear did not notify the Attorney General of Minnesota of this challenge because this challenge is not an attack on any particular Minnesota statute. Rather, it was and is an attack on the absence of any Minnesota statutes or court decisions placing maximum limits on punitive damage awards and adequately constraining the discretion of juries and, as in this case, appellate courts, in

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[6] This fact also disposes of respondent's contention, Opp., at 21, that the court below was deprived of the opportunity to review the constitutionality of the punitive damage award as a matter of state constitutional law. In its Petition for Rehearing, Pet., App., 46a, 48a, 52a, 58a, 60a, Goodyear expressly and repeatedly interposed the pertinent provisions of the Minnesota Constitution against this punitive damage award.

their exercise of their power to impose punitive damages.[7] Until Minnesota enacts such a statute, defendants in Goodyear's position have no statute to attack.[8]

3. The Presentation of Question 3—The Excessive Fines Clause Challenge to the $4,000,000 Punitive Damage Award

As discussed above, the punitive damage award at issue is that imposed *de novo* by the Supreme Court of Minnesota. Without contesting this fact, respondent, Opp., at 27, asserts that Goodyear "cannot rely upon the decision in this case . . . ." in this regard because Goodyear could have raised an Eighth Amendment challenge to the jury's award. But the jury's award was set aside because it was predicated on a legal theory that had not been submitted to it—failure to recall. Goodyear prevailed on this point on appeal, Pet., App. A, 18a-20a. Had the court below stopped at that point and ordered a retrial limited to punitive damages, there would have been no punitive damage award subject to objection by petitioner. The court below went on to act as both jury and reviewing court in imposing a *new* $4,000,000 award on a *new* legal theory,

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[7] The assumption underlying respondent's entire argument regarding notification of the Minnesota Attorney General is that Goodyear challenged *Minn. Stat.* § 549.20 (1987) on its face, because the law is clear that the Minnesota Attorney General need not be notified of cases in which the application of a statute to a particular case is challenged as unconstitutional. *See Clay* v. *Clay*, 397 N.W. 2d 571 (Minn. App. 1987). Nowhere does respondent suggest to this Court the basis for this critical assumption, which is unsupportable.

[8] Respondent, Opp., at 16, maintains that a litigant seeking to attack the constitutionality of a statute in Minnesota must do so pre-trial because such attacks are viewed as "affirmative defenses" that are "waived." However, neither the Minnesota rule cited by respondent nor the Minnesota cases relied upon by him involve or make any reference to constitutional challenges to statutes or otherwise purport to deal with the timeliness of a constitutional challenge to the *de novo* imposition of a punitive damage award by the Supreme Court of Minnesota.

mooting completely the question of the constitutionality of the jury's $12,500,000 award under the Eighth (or Fourteenth) Amendment. Goodyear's constitutional objections to the new punitive damage award were immediate and, therefore, timely.

4. No Prudential Considerations Counsel Against Review of Minnesota's Punitive Damage System in this Case

Respondent argues that the $4,000,000 award in this case "evidences" the close control that the Supreme Court of Minnesota exercises over the imposition and size of punitive damage awards. Opp., at 28. As Goodyear argues, however, the $4,000,000 figure arrived at by that court was completely arbitrary, unsubstantiated, essentially unexplained, and, indeed, could have been virtually any amount. Pet., at 10-11. If, as respondent correctly asserts, the court below is satisfied that it has these issues well in hand, there is no reason to believe that the passage of time will alleviate the need for this Court to review the constitutionality of Minnesota's punitive damage system.

Likewise, respondent asserts that the fundamental issues raised in this case regarding Minnesota's punitive damage system "have been carefully reviewed and regulated by . . . the Minnesota legislature . . . ." Opp., at 26. Respondent apparently takes the position that Minnesota's legislature has done all that needs to be done, but in any event does not suggest that that body is prepared to go beyond the cosmetic actions, Pet., at 24, it has recently taken. In respondent's own view, Minnesota's legislature, like its courts, is satisfied with the punitive damage system. That being the case, there would be no purpose served by any delay in this Court's review of that system and the arbitrary results it produces.

5. The Questions Presented are Substantial and Worthy of this Court's Plenary Consideration in this Case

On the merits, respondent does not appear to disagree that the questions presented by Goodyear are, at least in

the abstract, substantial and important. Rather, he argues that he would prevail because this case "represents the most reasoned approach and result" of punitive damage cases presently or recently on this Court's docket. Opp., at 26. Respondent proves perhaps more than he intends, because if his contentions are correct, then the Court will have the opportunity in this case to approve the Minnesota system as a model for other less enlightened States to follow.

As for Question 1, respondent does not contest that Goodyear should prevail if in fact liability for punitive damages was imposed for violation in 1981 of a legal duty newly announced in 1988. Instead, respondent suggests that a series of five Minnesota cases[9] decided since 1977 "foretold" that the Supreme Court of Minnesota would some day recognize a continuing, post-sale duty to warn as was recognized by that court for the first time in 1988 in this case. Tellingly, not a single one of these cases was relied upon by the Supreme Court of Minnesota in recognizing a continuing, post-sale duty to warn in this case. None of those cases is primarily concerned with a post-sale duty to warn. Indeed, the only case even cited by the Supreme Court of Minnesota in considering this new duty—which, in that court's own words, it had not "had occasion to deal with . . . before," was the decision of the Supreme Court of Michigan in *Comstock* v. *General Motors Corp.*,

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[9] *Frey* v. *Montgomery Ward & Co.*, 258 N.W. 2d 782, 786 (Minn. 1977); *Gryc* v. *Dayton-Hudson Corp.*, 297 N.W. 2d 921 (1980); *Hauenstein* v. *Loctite Corp.*, 347 N.W. 2d 272, 275 (Minn. 1984); *Willmar Poultry Co.* v. *Carus Chemical Co.*, 378 N.W. 2d 830 (Minn. 1985); *Balder* v. *Haley*, 390 N.W. 2d 855 (Minn. App. 1986), *rev'd*, 399 N.W. 2d 77 (Minn 1987). Of these five cases, which are otherwise distinguishable from the case at bar on multiple grounds, only one—*Gryc* v. *Dayton-Hudson Corp.*—involved a claim for punitive damages. *Gryc*, contrary to respondent's suggestion, involved a case in which the product—flannel cloth used for children's pajamas—was known by the manufacturer prior to its sale to be unreasonably dangerous. 297 N.W. 2d, at 730.

358 Mich. 163, 99 N.W. 2d 627 (1959). *Comstock* itself was only cited as analogous, *see* Pet., App., 12a, presumably because, unlike the case at bar, it involved a defective product—this case does not involve a defective product—where the defect became known to the manufacturer "shortly after the product ha[d] been put on the market." 99 N.W. 2d, at 634.

In addition, respondent fails to acknowledge that neither *Comstock* nor four of the five cases upon which he relies even involved the imposition of punitive damages. *See* note 9, *supra*. Goodyear does not contend in this Court that Minnesota is not free to push its common law in new directions and, in doing so, to require manufacturers to *compensate* persons who have been injured, even by non-defective products such as the KWX rim, based upon newly articulated standards of conduct. Indeed, Mr. Hodder has been completely compensated for his injuries by the Minnesota courts and Goodyear has not brought any federal objections to the compensatory award to this Court. Goodyear's argument is that a penalty or fine in the form of *punitive* damages may not be imposed on manufacturers for the violation of such newly announced, retroactively applied standards of conduct because there is no state interest in doing so that is even arguably sufficient to overcome the fundamental unfairness inherent in doing so.

With respect to Question 2, respondent makes the curious argument that legislatures should not place what he terms an "arbitrary ceiling" on punitive damage awards because doing so would allow defendants to "budget" their exposure to such awards into the cost of doing business. Opp., at 25. But the limitless and intentionally capricious system advocated by respondent is contrary to all accepted rationales for punishment and deterrence that form the basis of our legal system. *See, e.g.*, H. Packer, *The Limits of the Criminal Sanction* 45-48 (1968). As stated by Solicitor General Blackstone, "punishments of unreasonable severity, especially when indiscriminately inflicted, have

less effect in preventing crimes, and amending the manners of a people, than such as are more merciful in general, yet properly intermixed with due distinctions of severity." 4 W. Blackstone, *Commentaries on the Laws of England* 16-17 (1768).

With regard to Question 3, respondent asserts that the Court need not be concerned that the $4,000,000 award "far exceeds the maximum punishment established by the Minnesota legislature for similar conduct" because that legislature has otherwise stated some factors to be considered in the imposition of punitive damages. Opp., at 28. Respondent apparently takes the position that the Minnesota legislature need not be concerned at all with the Eighth Amendment's requirement, confirmed in *Solem* v. *Helm*, 463 U.S. 277, 292 (1983), that a punishment authorized by a State be reasonably proportioned to other punishments imposed by that State for similar conduct. If, as Goodyear asserted below and asserts in this Court, the Eighth Amendment applies to punitive damage awards, respondent's position could not be sustained absent a serious retrenchment by this Court from its decision in *Solem*. That, by itself, would present a substantial question worthy of this Court's review.

November 17, 1988

Respectfully submitted,

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APPENDIX

NOS. C3-87-419 and C2-87-511

STATE OF MINNESOTA
IN SUPREME COURT

DALE L. HODDER,
Respondent (C3-87-419)
Appellant (C2-87-511)

vs.

THE GOODYEAR TIRE & RUBBER COMPANY
and MOTOR WHEEL CORPORATION,
Appellants (C3-87-419)
Respondents (C2-87-511)

vs.

REMER OIL COMPANY,
Respondent.

DALE L. HODDER'S BRIEF AND APPENDIX

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* * * *

D. The Trial Court Correctly Applied The Standard Punitive Damage Instruction To Failure To Warn In A Product Liability Case And Did Not Thereby Deny Goodyear's Right To Due Process Of Law.

Punitive damages for willful disregard in product liability cases is well recognized in Minnesota. *Gryc, supra.* Here, Goodyear's constitutional argument is also based upon the false promise that the Court submitted punitive damages solely on a newly defined cause of action—failure to recall. To the contrary, the Court submitted punitive damages pursuant to §549.20 and the standard JIG 3rd Ed. 195 instruction. Goodyear's conduct in failing to warn and taking no remedial action in the face of safety engineering recommendations to recall is well defined and an obvious breach of its duty to warn and instruct. Goodyear cannot argue that it had no notice of a duty to recall the KWX rim because it was given such notice by its own field engineering staff and safety vice-president. RA.24, 47, 50. Goodyear cites no case for the proposition that punitive damages in the posture of this case violate its right to due process. *Aetna Life Insurance Co. v. Lavoie*, 106 Sup. Ct. 1580, 1589 (1986), is not even remotely in point. The United States Supreme Court held that Defendant's due process rights were violated because the Alabama Supreme Court Justice who wrote the opinion affirming punitive damages had a similar bad faith insurance claim pending that therefore a stake in the outcome. The Court specifically declined to comment on the appropriateness of punitive damages for insurance company bad faith in Alabama.

* * * * *